

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Rules and Policies to Promote New Entry)	
And Ownership Diversity in the)	MB Docket No. 17-289
Broadcasting Services)	
)	
To The Commission)	

**REPLY COMMENTS OF TWENTY-TWO (22) MEMBERS
OF THE FEDERAL COMMUNICATIONS COMMISSION'S
ADVISORY COMMITTEE ON DIVERSITY
AND DIGITAL EMPOWERMENT**

REGARDING THE PROPOSED INCUBATOR PROGRAM

April 25, 2018

Twenty-two (22) individual members (hereinafter collectively referred to as “Signators”) of the Advisory Committee on Diversity and Digital Empowerment (“ACDDE”) and/or its Broadcast Development Working Group respectfully submit these Reply Comments on broadcast incubators.¹ Leave is respectfully requested for acceptance of these Reply Comments slightly out of time. Their submission makes possible a response, by members of the ACDDE, including those who helped craft the ACDDE’s incubator proposal, to all of the various questions and comments raised on the record by members of the public.

Incentives for the Incubator Program. The Office of Communication, Inc. of the United Church of Christ *et al.* (“UCC”) regards the adoption of any incubator program as “futile without strict media ownership limits.”² However, the model the ACDDE has chosen – tax relief rather than waivers – does not stretch the Commission’s media ownership limits. Instead, the ACDDE’s model would add new voices and foster deconsolidation.³ Instead of waivers, the ACDDE’s proposal is modeled on the highly successful tax certificate program, a living example of which is provided in the formal Comments of the legendary minority broadcaster Skip Finley.⁴

¹ These Reply Comments represent the views of the Signators and are not intended to represent the views of the organizations to which the Signators belong, nor to represent the views of the Federal Communications Commission. All of the Signators are volunteers, and none received compensation for his or her roles in developing, preparing, reviewing or approving these Reply Comments.

² UCC Comments, March 9, 2018, at 4. *See also* Free Press Comments, March 9, 2018, at 3.

³ *See* ACDDE Comments, April 1, 2018, at 37.

⁴ *See* Comments of Skip Finley, March 9, 2018, at 1-3; *see also* NAB Comments, March 9, 2018, at 4 (noting that “sufficient market-based incentives to ensure significant participation by radio and TV broadcasters...were the keys to success” of the tax certificate program.) REC Networks proposes, as an incentive, regulatory fee exemptions for a specific period of time. REC Networks Comments, March 9, 2018, at 4. Although this is a worthy idea, the amount of money involved is probably too small to provide a sufficient incentive for incubation.

Data Collection. UCC also opposes any incubator program because “the Commission’s chronic failure to collect sufficient ownership data makes it impossible to tailor a program that will improve ownership diversity or to assess the impact of such a program.”⁵ UCC is correct in asserting that the Commission should collect sufficient ownership data. The ACDDE believes that this data should be a part of the Commission’s *Adarand* studies⁶ and also part of its cost-benefit analysis of the incubator program.⁷ However, the Commission’s past failure to acquire and apply adequate metrics is no reason for the agency to do nothing about attempting to correct the dismal state of minority and female ownership. The paucity of minority and female ownership is simply too severe to continue to hold remedies in abeyance. Moreover, the ACDDE and industry can assist the Commission in providing an initial measurement of diverse ownership to ascertain the program’s impact.

Eligible Entity Definition. While the NAB “does not oppose adoption of an SDB or ODP standard,”⁸ it prefers a modified “new entrants” standard or a revenue-based standard with minor modifications.⁹ In light of the difficulty in preventing abuse, and the inherent exclusion of

⁵ See UCC Comments at 4; see also Free Press Comments at 3. UCC also opposes “any” incubator program because “the FCC is not attempting to promote minority and female ownership as the central goal of the incubator program.” UCC Comments at 4. It is not apparent why a regulation substantially benefitting minorities and women should be rejected solely because it also benefits others (e.g. Social Security, Medicare, prison payphone reform, Lifeline).

⁶ See ACDDE Comments at n. 29.

⁷ See *id.* at 55-56.

⁸ See NAB Comments at 16. The NAB is uncertain whether the ODP paradigm “could create regulatory uncertainty unrelated to judicial review.” *Id.* at 21. The ACDDE addressed this topic at length in the ACDDE Comments at 13-26 (explaining why the ODP paradigm contains minimal regulatory uncertainty and would not be difficult to administer in practice).

⁹ See NAB Comments at 17-19. The ACDDE addressed what it believes to be disqualifying deficiencies in these definitions in the ACDDE Comments at n. 27 (new entrant definition) and n. 28 (revenue based definition).

incumbents who could benefit from incubation as they seek to expand into new markets or new media,¹⁰ the Signators do not favor a new entrant definition.¹¹ However, if the Commission ultimately prefers a new entrant definition, the NAB's proposed reforms to that definition are well taken and should be considered.¹²

In its Reply Comments, the NAB again expresses concern that the Overcoming Disadvantages Preference (“ODP”) standard would require “subjective decisions on the qualifications of incubatee candidates, which could be time-consuming, complex and subject to challenges.”¹³ But as the ACDDE explains in its Comments, “[t]here is necessarily some subjectivity concerning determinations of the severity of a disadvantage and a person’s degree of success in overcoming it. However, making routine personnel decisions and selecting award winners also involve subjective decisions.”¹⁴

¹⁰ *See id.* at 5, 50.

¹¹ *See id.* at n. 27.

¹² The NAB’s March 26, 2018 Letter reports the results of a statistical analysis of FM auctions showing that winning bidders relying on new entrant bidding credits were 93% more likely to be women than winning bidders who did not use a credit, and 40% more likely to be minorities. *Id.* at 4. The ACDDE’s statistical analysis produced similar results. *See* ACDDE Comments at n. 27. However, the new entrants credit would still be problematic because of the possibility of abuse. *Id.* Nor would it allow for the incubation of incumbents attempting to expand or grow, as contemplated in the ACDDE’s proposal (*id.* at 5, 50). As the ACDDE concluded in its Comments:

[A]lthough the ACDDE does not recommend that the Commission use this “new entrant” definition due to the difficulty in preventing abuse, the ACDDE suggests that if other definitions fail, the Commission might revisit this definition to consider whether, for example, a “new entrant” definition that omits “legacy” applicants, such as the children or spouses of broadcasters, might have some utility.

Id. at n. 27.

¹³ *See* NAB Reply Comments, April 9, 2018, at 10.

¹⁴ ACDDE Comments at 23.

The Signators believe that the ODP is too important in civil rights policy to be left untried. It has the potential of being that rare vehicle that offers relief for those who have experienced disadvantages *and* that confers that relief on those who have invested uncommon individual initiative in overcoming those disadvantages. As such, it may be the solution-in-waiting to the quandary of affirmative action. It should not be lightly dismissed simply because, like almost everything in life, it requires some measure of subjective judgment.

Thus, the Signators recommend that if the Commission is inclined to consider the “new entrants” paradigm, and is able to find a way to avoid fraud and abuse of that paradigm that the ACDDE fears,¹⁵ the ODP should be employed as an alternative paradigm that an applicant could elect to be sure the agency doesn’t overlook any worthy applicants.

Potential for Abuse. Free Press is concerned about “whether sharing agreements such as JSAs and SSAs should play a role in an incubation relationship” and is “gravely concerned about the Commission’s proposal to offer waivers of local ownership rules.”¹⁶ The ACDDE shares Free Press’ concerns about sharing agreements, and therefore has proposed to limit their use to exceptional cases and very limited time periods so that they serve only the legitimate purpose of helping a newcomer to broadcasting master the basics of station operations.¹⁷ As noted above, the ACDDE did not propose the use of waivers.¹⁸

Eligible Candidates. REC Networks would disqualify “existing station owners that need financing” and would limit the program “to entities that are currently not engaged in any

¹⁵ *See id.* at n. 27.

¹⁶ *See* Free Press Comments at 2.

¹⁷ *See* ACDDE Comments at 36, 38-39 (advocating tight limits on SSAs and JSAs to restrict these abuse-prone vehicles to their original, very narrow purposes). As the ACDDE stated, “[t]hey must be used only to assist in, and never to substitute for, incubation.” *Id.* at 36.

¹⁸ *See* ACDDE Comments at 37.

broadcasting operations at a management or ownership level.”¹⁹ The Signators do not believe that these limitations are necessary. Moreover, such limitations would be contrary to the very intent of the incubator program, which is to foster viable and sustainable ownership diversity, and the Commission’s ongoing obligations to identify and eliminate market entry barriers for small businesses under Section 257 of the Communications Act.²⁰ It could be desirable to incubate broadcast managers seeking to become owners, or small owners seeking to become major market or large facility owners.²¹ Small and mid-sized incumbents who are ready to expand their platforms horizontally, serve larger markets, or make the leap from radio into television might also benefit from incubation.²²

Inducements. While some commenters prefer the use of rule waivers as incentives for incubation,²³ the Signators continue to believe that tax relief is a more desirable and sustainable incentive for incubation than are waivers. *First*, the use of waivers would plunge the incubator program deeply and unavoidably into the politics of broadcasting’s “100 Years War” over the multiple ownership rules, virtually guaranteeing additional years of inaction. The waiver paradigm that was invoked by incubator proponents from 1990-2017 produced no incubator program, largely for this reason. The Signators do not want to wait another 28 years with no incubator program.

¹⁹ See REC Networks Comments at 3.

²⁰ 47 U.S.C. § 257 (1996).

²¹ See ACDDE Comments at n. 72.

²² See *id.* at 5, 50.

²³ See NAB Comments at 12, NAB Reply Comments at 5-6, and Bonneville Reply Comments (April 9, 2018) at 3 (suggesting a menu of benefits including waivers in the relevant market or in another market, or “waiver credits” for use in future transaction or once the incubated entity “graduates” to full ownership of the station).

Further, a waiver incentive coupled with a tax relief incentive – while a creative suggestion – will result in no incentive and thus no program. Tax bill writers on the Hill will ask “why should we write a bill creating a tax incentive when the FCC has already proposed a powerful waiver incentive?” Thereupon matters will be back where they started: with no incubator program, and only poor judgment to blame.

Tax relief that flows *only* to incubation transactions should be scored very favorably by the Congressional Budget Office.²⁴ Thus, the paradigm the ACDDE recommends has the advantage of providing the best opportunity in years to secure what virtually everyone wants: the return of meaningful tax incentives to promote ownership diversity in broadcasting.

Program Operations. The Signators concur with several of the NAB’s proposals relating to the practical operation of an incubator program.²⁵

Exercise of Incubated Station’s Call Option. The NAB suggests two end-of-incubation scenarios in addition to a call of the incubating company’s interest as proposed by the ACDDE: (1) sale of the station to a third party to “help fund the incubatee’s investment in another property” or (2) an arrangement whereby “the incubatee may seek to participate in another incubator arrangement, perhaps with a larger financial stake or at a bigger station in a larger market.”²⁶ These suggestions are well taken and are worthy of inclusion in an incubator program.

²⁴ See ACDDE Comments at 6.

²⁵ See NAB Comments at 7 (suggesting boundaries defining financial and training participation of the incubating company that would not amount to *de facto* control); at 10 (“[b]roadcasters’ experience in this arena suggests that an incubator agreement term should be no less than three years” (see ACDDE Comments at n. 70 and NAB Comments at 10-11 (joint application to the FCC for incubator status); *id.* at 22-23 (compliance review).

²⁶ See NAB Comments at 9.

Respectfully submitted,

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